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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ANTHONY M. EATON and JEROME CHARLES
RUZICKA

Appeal 2009-003730
Application 09/492,913
Technology Center 2600

Before ROBERT E. NAPPI, JAY P. LUCAS, and
BRADLEY W. BAUMEISTER, *Administrative Patent Judges*.

BAUMEISTER, *Administrative Patent Judge*.

DECISION ON APPEAL¹

¹ The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, or filing a request for rehearing, as recited in 37 C.F.R. § 41.52, begins to run from the “MAIL DATE” (paper delivery mode) or the “NOTIFICATION DATE” (electronic delivery mode) shown on the PTOL-90A cover letter attached to this decision.

STATEMENT OF CASE

Appellants appeal under 35 U.S.C. §§ 6(b) and 134 from the Examiner's rejection of claims 1-5, 15-72, and 93-95 (Br. 1). Claims 6-14, 73-92 have been withdrawn from prosecution (*id.*).

We affirm.

[Appellants' invention relates to systems, structures, and methods . . . to fit, program, or upgrade a hearing aid system to a patient. One embodiment includes the use of a mobile device to interact with the hearing aid system through a short-range network. The mobile device is also adapted to communicate with a server through a long-range wireless network. The server [, which is more specifically referred to as a programming fitting server,] may reside on the Internet.

(Abstract; claim 1).

Independent claim 1 is illustrative, reading as follows:

1. A method comprising:

using a mobile wireless communication protocol to communicate between a mobile device and a programming fitting server; and

programming software in a hearing aid using the programming fitting server and the mobile device.

Claims 1-5, 15-21, 24-26, 30, 32, 33, 36, 47-53, 56-58, 64-66, 68, 69, and 94 stand rejected under 35 U.S.C. § 103(a) as obvious over Hagen (US 6,424,722 B1) in view of Anderson (US 5,721,783).

Claims 22, 23, 54, and 55 stand rejected under 35 U.S.C. § 103(a) as obvious over Hagen in view of Anderson and Shennib (US 5,197,332).

Claims 27-29, 31, 32, 34, 35, and 59-63 stand rejected under 35 U.S.C. § 103(a) as obvious over Hagen in view of Anderson and Leppisaari (US 6,717,925 B1).

Claims 37-40 stand rejected under 35 U.S.C. § 103(a) as obvious over Hagen in view of Anderson and Szymansky (US 6,557,029 B2).

Claims 41 and 71 stand rejected under 35 U.S.C. § 103(a) as obvious over Hagen in view of Anderson and Knappe (US 6,061,431 B1).

Claims 43-46 stand rejected under 35 U.S.C. § 103(a) as obvious over Hagen in view of Anderson and Fazio (US 6,590,986).

Claims 42 and 72 stand rejected under 35 U.S.C. § 103(a) as obvious over Hagen in view of Anderson, Leppisaari and Peters (US 6,601,093 B1).

Claims 67, 70, 93, and 95 stand rejected under 35 U.S.C. § 103(a) as obvious over Hagen in view of Anderson and Peters.

I.

Arguments regarding the obviousness rejection of

Claim 1² over Hagen in view of Anderson

The Examiner finds that Hagen's Figure 9 embodiment includes a host computer 236 that corresponds to the claimed programming fitting server; a portable multiprogram unit (PMU) 320 that corresponds to the claimed mobile device; and hearing aids 344, 348 that receive programming software from the PMU via a wireless link 342, 346 (Ans. 3; *accord* Hagen col. 14, ll. 19-22; Fig. 9). That is, the Examiner finds (Ans. 3) that Hagen discloses all of the limitations of representative claim 1 except for the claim limitation requiring that the programming fitting server use a mobile

² Appellants argue claims 1-5, 15-21, 24-26, 30, 32, 33, 36, 47-53, 56-58, 64-66, 68, 69, and 94 together as a group. *See* Br. 10. Accordingly, we select independent claim 1 as representative. 37 C.F.R. § 41.37(c)(1)(vii).

wireless communication protocol (*see* Hagan, Figure 9 (depicting the PMU receiving signals from the host computer 236 via cable 314)).

Regarding representative claim 1, Appellants allege seven reasons for why Hagen and Anderson were improperly combined: (1) “[t]he Office does not consider the interrelated context for the claimed subject matter and the interrelated context for the references”; (2) “[t]he Office mischaracterizes element 19 of Anderson as a programming fitting server”; (3) “Anderson does not program hearing aids; the RPU of Anderson does not program a hearing aid”; (4) “Anderson teaches away from Hagen et al.”; (5) [t]he proposed combination of Anderson to Hagen et al. would destroy the ability of Hagen et al. to program hearing aids”; (6) “A combination of Hagen et al. to Anderson would destroy the ability of Anderson to process signals in the RPU rather than the earpiece”; and (7) “[t]here is no clearly articulated reasoning with a rationale underpinning to take the isolated feature of the RPU 16 out of the context of the disclosure of Anderson in order to combine it with Hagen et al.” (Br.³ 10-13). Appellants further argue that “[t]he combination of references, as proposed by the Office, do not show all of the claimed subject matter” of representative claim 1 (Br. 14-15).

The two primary issues, then, are:

1. Does the combination of Hagen and Anderson disclose all of the subject matter of claim 1?
2. Does sufficient motivation exist to modify Hagen so as to substitute a wireless communication protocol for the cable that interconnects Hagen’s host computer (or program fitting server) and PMU (or mobile device)?

³ Appeal Brief filed Apr. 14, 2008 (amended May 10, 2008).

As a threshold matter, we find that the combined teachings of Hagen and Anderson do disclose all of the subject matter of claim 1. Appellants' arguments to the contrary are based upon improperly considering the prior art references *individually*. However, it is well settled that one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. *See In re Keller*, 642 F.2d 413, 426 (CCPA 1981); *In re Merck & Co., Inc.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986). Appellants have not set forth any arguments for why Hagen and Anderson *in combination* fail to show all of the subject matter of claim 1.

Turning to the second issue, we further find that Anderson provides sufficient motivation to modify Hagen so as to substitute a wireless communication protocol for the cable that interconnects Hagen's host computer and PMU. As noted by the Examiner (*e.g.*, Ans. 4), Anderson states that a "hearing test program may be loaded into the RPU DSP [(remote processing unit digital signal processor)] 948 through the secondary wireless link 944 or a wired peripheral link 950" (col. 27, ll.22-24). That is, Anderson discloses that a hardwire link and a wireless link were art recognized functionally equivalent means for establishing digital communication between a mobile device and a server.

Moreover, the Supreme Court held in *KSR* that "[t]he combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results." *KSR Int'l. Co. v. Teleflex, Inc.*, 550 U.S. 398, 416 (2007). The Court further held that "if a technique has been used to improve one device, and a person of ordinary skill in the art would recognize that it would improve similar devices in the same way, using the technique is obvious unless its actual application is beyond his or

her skill.” *Id.* at 417. Following the *KSR* decision, our reviewing court has, in turn, held that “the adaptation of an old idea or invention . . . using newer technology that is commonly available and understood in the art” was merely an obvious modification. *Leapfrog Enter., Inc. v. Fisher-Price, Inc.*, 485 F.3d 1157, 1162 (Fed. Cir. 2007). In the present case, Appellants have not argued, much less provided any evidence, that it would have been beyond the skill in the electronic communications art to substitute Anderson’s wireless communication protocol for Hagen’s hardwired cable connection (see Br.10-23).

II.

*Separate arguments regarding additional claims
rejected over Hagen in view of Anderson*

Appellants also set forth additional arguments in relation to (1) claims 4 and 5 (Br. 15); (2) claims 15-21, 24-26, 30, 32, and 33 (Br. 15-16); (3) claims 36 and 94 (Br. 16-17); (4) claims 47-53, 56-58, 64, and 65 (Br. 17); and (5) claims 66, 68, and 69 (Br. 18). These arguments are not persuasive.

Regarding independent claim 4 and dependent claim 5, Appellants argue

the combination of Hagen et al. and Anderson does not illustrate the programming a hearing aid system through a mobile device using at least one mobile wireless communication protocol. The combination does not illustrate programming a hearing aid, where programming the hearing aid includes receiving a distributed application in the mobile device from a programming fitting server through at least one long-range network using the at least one mobile wireless communication protocol, and using the distributed application

to program a hearing aid in the hearing aid system, as recited in claim 4.

(Br. 15). However, this assertion does not constitute an argument on the merits because it is essentially a mere restatement of independent claim 4. “A statement which merely points out what a claim recites will not be considered an argument for separate patentability of the claim.” 37 C.F.R. § 41.37(c)(1)(vii).

Regarding independent claim 15 and dependent claims 16-21, 24-26, 30, 32, and 33, Appellants effectively argue that neither Hagen nor Anderson, *individually*, teaches all of the elements of claim 15 (Br. 15-16). Appellants repeat this argument in further relation to independent claim 66 and dependent claims 68 and 69 (Br. 18). However, Appellants have not provided any arguments regarding the *combined* teachings of Hagen and Anderson.

Regarding independent claim 36 and dependent claim 94, Appellants assert that the claim language relating to the use of a distributed application to program the hearing aid is missing from both cited references, and the Examiner has improperly taken official notice of this missing feature (Br. 16). In fact, though, the Examiner has set forth a rationale for why Hagen discloses a distributed application (Ans. 8), and Appellants have not provided any arguments for why the Examiner’s interpretation is improper (*see* Br. 16-17). *See In re Bond*, 910 F.2d 831, 832 (Fed. Cir. 1990) (noting that there is no *ipsissimis verbis* test for determining whether a reference discloses a claim element, i.e., identity of terminology is not required).

Regarding independent claim 47 and dependent claims 47-53, 56-58, 64, and 65, Appellants effectively argue that neither Hagen nor Anderson,

individually, teaches all of the elements of claim 47 (Br. 17). However, Appellants have not provided any arguments regarding the *combined* teachings of Hagen and Anderson.

For the foregoing reasons set forth in sections I and II, then, Appellants have not persuaded us of error in the Examiner's obviousness rejection of representative claims 1, 4, 15, 36, and 47. Accordingly, we will sustain the Examiner's rejection of those claims as well as dependent claims 2, 3, 5, 16-21, 24-26, 30, 32, 33, 48-53, 56-58, 64-66, 68, 69, and 94.

III.

Arguments regarding claims rejected over Hagen in view of Anderson and other references

Appellants argue that the rejection of claims 27-29, 31, 32, 34, 35, and 59-63 does not provide a proper motivation to further combine Leppisaari with Hagen and Anderson (Br. 19). The Examiner, though, has set forth a motivation to combine Leppisaari (Ans. 12 (stating the motivation of "provid[ing] a method of operating a mobile communication system supporting radio data transmission between a mobile station and a network in a number of different [specified] packet data protocols")), thereby establishing a *prima facie* case of obviousness. Appellants have not provided any arguments for why this purported motivation is allegedly improper. As such, Appellants' unsupported conclusion, that the rejection's motivation is improper, is not persuasive.

Appellants similarly assert without any supporting rationale that (1) the rejection of claims 37-40 does not provide a proper motivation to further combine Szymansky with Hagen and Anderson (Br. 20); and (2) the

rejections of claims 42, 67, 70, 77, 93, and 95 does not provide a proper motivation to further combine Peters either with Hagen and Anderson alone (Br. 22) or alternatively in further combination with Leppisaari (Br. 21). The Examiner has, though, set forth a motivation to combine Szymansky – “to provide several different software processes simultaneously in the database” (Ans. 13-14), as well as a motivation to combine Peters – “to provide [sic] provide a communication system with is a low-powered radio module” (Ans. 17-18). Accordingly, Appellants’ additional unsupported conclusions, that these rejections’ motivations are also improper, are not persuasive.

With respect to the remaining rejections of claims 22, 23, 41, 43-46, 54, 55, 71, Appellants provide no patentability arguments directed to the additional references of Shennib for claims 22, 23, 54, and 55; Knappe for claims 41 and 71; or Fazio for claims 43-46. Rather, Appellants repeat arguments directed to claims 15, 24 and 47, and Appellants apply them to the remaining rejections (Br. 19-21). Accordingly, for the reasons discussed above, we also sustain the rejections of claims 22, 23, 41, 43-46, 54, 55, 71.

DECISION

The Examiner’s decision rejecting claims 1-5, 15-72, and 93-95 is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1). *See* 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED

Appeal 2009-003730
Application 09/492,913

gvw

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